

THE SEC WHISTLEBLOWER PRACTICE GUIDE

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*Navigating the SEC Whistleblower Program and the Rules
and Procedures that Can Lead to Financial Rewards for
Reporting Securities Violations*

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 KATZ, MARSHALL & BANKS

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Introduction

Congress directed the Securities and Exchange Commission (“SEC”) to establish a whistleblower program as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Under the program, an individual who provides the SEC with original information leading to an enforcement action that results in over \$1 million in monetary sanctions is eligible to receive an award of 10% to 30% of the amount collected.

The SEC began accepting tips concerning potential securities violations on July 22, 2010. By the end of fiscal year 2013, the SEC Office of the Whistleblower had received 6,573 tips,² and to date the SEC has issued ten awards to 14 whistleblowers, with one of those whistleblowers receiving \$30 million. At the same time that Dodd-Frank’s whistleblower-reward provisions are providing monetary incentives to individuals who submit helpful information to the SEC, the statute’s whistleblower protections are helping to ensure that insiders can approach the SEC with information without fear of reprisal.

The SEC Whistleblower Program has been steadily picking up speed since its inception, and it is sure to generate many more and larger awards as the SEC completes ongoing investigations and as more corporate insiders learn about the program’s financial incentives and related workplace protections. SEC officials have been outspoken in praising the program as a significant addition to the Commission’s ability to enforce the nation’s securities law, in some cases facilitating early intervention in unlawful conduct so as to minimize the harm to investors. In a recent speech to corporate directors and executives, SEC Chair Mary Jo White noted that the program “has already had a significant impact on our investigations [and] helped the Enforcement Division identify more possible fraud and other violations and earlier than would otherwise have been possible.”³

The goal of this practitioner’s guide is to explain the rules and procedures of the SEC Whistleblower Program to assist whistleblowers and their counsel in submitting their tips in a form and manner that will protect investors and earn whistleblowers financial awards for their role in helping to enforce the nation’s securities laws.

²See U.S. Securities and Exchange Commission, 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program (“Annual Report”), at 8. According to the report, the most common categories of complaints in the 2013 fiscal year focused on corporate disclosures and financials (17.2%), offering fraud (17.1%), and market manipulation (16.2%). These categories were also the most common in fiscal year 2012. *Id.* The SEC received tips in fiscal year 2013 from all 50 states and the U.S. territories of Puerto Rico, Guam, and the U.S. Virgin Islands, and has also received tips from 68 foreign countries since July 2010. *Id.* at 9-10. The 2013 Annual Report is available at <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>.

³ Chairman White’s speech, presented at the annual Stanford University Directors’ College in June 2014, is available on the SEC’s website at http://www.sec.gov/News/Speech/Detail/Speech/1370542148863#.VAZz2_ldUYM.

I. Background

The Dodd-Frank Act is the latest in a series of significant financial reforms that began with passage of the Sarbanes-Oxley Act (“SOX”) in 2002. Popular outrage over the greed exhibited and corruption engaged in by Enron, MCI and other companies prompted Congress' near-unanimous passage of the earlier law, which provided a detailed, comprehensive set of rules and regulations designed to prevent accounting fraud by publicly traded companies. SOX also contained a whistleblower provision to protect employees from retaliation by their employers for reporting fraud. *See* 18 U.S.C. § 1514A (“SOX 806”).

Another wave of financial overhaul and enhanced corporate whistleblower protections accompanied the extraordinary infusion of government funds into the private sector that addressed the sharp downturn of the housing and financial markets in 2008. That financial crisis was still unfolding when Bernard Madoff's “Ponzi” scandal hit the news and educated large numbers of Americans about the shortcomings in the government's ability to detect and prevent large-scale fraud on investors in the financial markets. The “bailout” legislation that followed included protections for whistleblowers who report fraud, gross mismanagement, or waste of bailout funds. In 2009, Congress also amended the U.S. False Claims Act, making it easier for whistleblowing “relators” to bring *qui tam* actions to assist the U.S. government in recovering monies lost to fraud.

The Dodd-Frank Act of 2010 initiated a massive financial regulatory overhaul that lawmakers hoped would help restore confidence (and some would say sanity) in U.S. financial markets through a wide range of regulatory measures. The SEC Whistleblower Program contributes to this effort by incentivizing insiders to come forward with information about securities violations, giving the SEC a powerful enforcement tool to help it prevent future Enrons, MCI's and Madoffs from harming the investing public and the broader economy.⁴

The SEC Whistleblower Program received an enthusiastic welcome from employee-rights advocates and “good-government” groups, but initially generated a great deal of concern

⁴ This article focuses on the SEC Whistleblower Program, but whistleblowers and their counsel should keep in mind that Dodd-Frank established a very similar whistleblower program for commodities trading that is administered by the Commodities Futures Exchange Commission (“CFTC”). The range of trading that can form the basis for tips to the CFTC is broader than some might think, and includes trades not only in cotton and pork bellies but also in oil and gas, currencies, and investment products such as derivatives and swaps. Although the CFTC program has attracted fewer whistleblower tips than the SEC program (58 in fiscal year 2012 and 138 in fiscal year 2013 according to the annual reports available at www.cftc.gov), the CFTC's announcement earlier this year of its first whistleblower award in the amount of \$240,000 is sure to attract more tips and lead to more awards. *See* Order and Whistleblower Award Determination (CFTC May 18, 2014), available online at <http://www.cftc.gov/ucm/groups/public/@whistleblownotices/docum/ents/file/wb-app-2014-02-19-01.pdf>.

among large corporations and their law firms. After asking for public comment on its proposed rules for the program in November 2010, the SEC received some 240 comment letters and 1,300 form letters from a broad array of stakeholders. Consumer advocates and the whistleblower community argued that the program was necessary to prevent the sort of fraud that had damaged the economy in the prior decade, largely at the expense of the nation's working people. The whistleblower community noted that corporate employees were in the best position to identify corporate misconduct, but that many were afraid to come forward because the very real risk of derailing their careers far outweighs the rewards, which would be few in the absence of significant financial incentives.

The corporate defense bar and their clients, on the other hand, claimed that the SEC whistleblower program, which they called a "bounty-hunter program," would serve only to create a perverse incentive for employees to hunt for information about potential corporate fraud or illegalities, disclose nothing to the employer, and then report the information to the government only when the violations had grown to a size that would warrant payment of a large enough "bounty" to justify the risk to their careers. Corporations noted that they had gone to great lengths to create internal reporting mechanisms, as the Sarbanes-Oxley Act required public companies to do, only to find themselves facing a radical new program that they claimed would give would-be whistleblowers little or no reason to use internal channels that could help management correct minor problems before they became major liabilities.

The final rules that the SEC adopted by a 3-2 vote on May 25, 2011, reflected the Commission's effort to address these competing concerns.⁵ The business lobby and defense bar remained dissatisfied, as was evident in a number of statements issued by the U.S. Chamber of Commerce and others in response to issuance of the final rules. As the past few years have demonstrated, however, the Commission and its staff have designed and implemented what is proving to be a workable and very effective program – both in rewarding whistleblowers and in giving corporations incentives to strengthen their compliance programs.

This is certainly the view of key personnel at the SEC. Office of the Whistleblower Chief Sean McKessy explained in a speech at Georgetown University on August 11, 2011, the day before the final rules officially took effect, that SEC Whistleblower Program was designed to "bolster, not hamper, the internal compliance systems at companies across the country."⁶

⁵ The Adopting Release and the final rules, a combined 305 pages, are available on the SEC's website at <http://www.sec.gov/rules/final/2011/34-64545.pdf>. This document provides a comprehensive summary of the policy discussion surrounding the formation of the SEC Whistleblower Program, and is an invaluable resource for whistleblowers and their lawyers, as well as for corporate counsel whose clients may become the subject of whistleblower tips. The text of the rules themselves begins on page 241. The rules are codified at 17 C.F.R. pt. 240 and 249 (2012), but this article, like most written on the subject, uses instead the numbering system used in the final rules themselves and the Adopting Release that explains them.

⁶ The Office of the Whistleblower's website (<http://www.sec.gov/whistleblower>) contains a wealth of information about the Commission's whistleblower program and enforcement practices. A transcript of Mr. McKessy's speech at Georgetown University is available on the SEC's website at <http://www.sec.gov/news/speech/2011/spch081111sxm.htm>.

Consistent with his early expectations, McKessy was able to tell the *Wall Street Journal* two years later that “companies are generally investing more in internal compliance as a result of our whistleblower program so that if they have an employee who sees something, they’ll feel incentivized to report it internally and not necessarily come to us.” McKessy also noted, “The vast majority of people who come to us about their current or former company do say they tried to report internally.”⁷

SEC Associate Director of Enforcement Stephen L. Cohen reiterated this point to an annual conference of compliance professionals on October 7, 2013. “So far,” Cohen said, “I am seeing a significant majority of whistleblower claims from people who have reported *internally* first. They don’t appear to be running to the SEC and away from corporate compliance programs.”⁸ And the draft of a five-year strategic plan that the SEC released in February 2014 forecasts the Commission’s continued reliance on the whistleblower program to further its investigations and expand its ability to use limited resources to police compliance with U.S. securities laws.⁹

II. The SEC Whistleblower Program

Under the program, the SEC is required to pay awards to eligible whistleblowers who voluntarily provide the commission with original information that leads to a successful enforcement action in which the SEC recovers monetary sanctions in an amount over \$1,000,000, which can include disgorgement, penalties, fines and interest. If the whistleblower meets these and other criteria described below, he or she (or “they” as explained below) is entitled to an award of 10% to 30% of the amount recovered by the SEC or by certain other authorities in “related actions.” These awards can be substantial, as SEC sanctions against companies have run into the tens and even hundreds of millions of dollars in recent years. The SEC set aside over \$450 million to fund payments to whistleblowers, and, as will be discussed further below, the Commission has already handed out several awards in the six figures and one in the amount of \$30 million. The investor-protection fund has a balance of over \$400 million.

The remainder of this article will provide practitioners with an overview of the key laws and rules governing the SEC whistleblower program, with a focus on how to prepare and

⁷ Rachel Louise Ensign, *Q&A: Sean McKessy, Chief, SEC’s Office of the Whistleblower*, WALL STREET JOURNAL (RISK & COMPLIANCE JOURNAL BLOG), September 24, 2013, <http://blogs.wsj.com/riskandcompliance/2013/09/24/q-a-sean-mckessy-chief-of-the-secs-office-of-the-whistleblower/>.

⁸ Associate Director Cohen was instrumental in developing the SEC Whistleblower Program. His speech at the 12th Annual Compliance & Ethics Institute in Washington, D.C., is available at <http://www.sec.gov/News/Speech/Detail/Speech/1370539872783#.Un0Xkfk3uCk>

⁹ The SEC’s draft Strategic Plan for Fiscal Years 2014-2018 is available on the SEC’s website at <http://www.sec.gov/about/sec-strategic-plan-2014-2018-draft.pdf>. The draft remains open for public comment at this writing.

advance high-quality tips that can help the SEC combat securities violations and at the same time earn rewards for whistleblowers.

A. Whistleblower Status

The Dodd-Frank Act defines a “whistleblower” as an “individual ... or two or more individuals acting jointly.” Section 21F(a)(6). The final rules make it clear that a corporation or other such entity is not eligible for whistleblower status. Rule 21-F2(a).

As noted above, the SEC Whistleblower Program has accepted tips from individuals throughout the United States and in at least 68 foreign countries.¹⁰ In issuing a recent \$30 million award (the largest to date as of this writing), the SEC made clear that it will make awards to foreign nationals where otherwise appropriate, even when the whistleblower resides overseas and submits the tip from overseas, and the misconduct complained of occurs entirely overseas.¹¹

1. “Voluntarily Provide”

In order to qualify for a reward under Section 21F(b)(1) of the Securities Exchange Act,¹² a whistleblower must “voluntarily provide” the SEC with information concerning a securities violation. The SEC will view such information as provided voluntarily only if the whistleblower provides it to the Commission before he has received a request, inquiry or demand for the same: 1) from the SEC; or 2) connection with an investigation, inspection or examination by the Public Company Accounting Oversight Board or a self-regulatory organization; or 3) related to an investigation by Congress, another federal agency or authority, or a state attorney general or securities regulator. Rule 21F-4(a)(1), (2).

The final rules address a concern among whistleblower advocates who pointed out that the proposed rules had suggested a whistleblower might lose eligibility because the SEC or

¹⁰ See Introduction, above at 3 n. 2.

¹¹ In so ruling, the SEC acknowledged well-established limits on the extraterritorial application of U.S. law, as set forth by the Supreme Court in *Morrison v. Nat’l Aust. Bank Ltd.*, 561 U.S. 247, 266 (2010). See Order Determining Whistleblower Award Claim, Release No. 73174 (Sept. 22, 2014), at 2. The SEC noted, however, that the Court in *Morrison* had acknowledged that the application of U.S. law in cases having certain foreign aspects could nonetheless be a domestic rather than an extraterritorial application in circumstances where the application targeted conduct or situations that were a “focus of congressional concern” that also had a “sufficient U.S. territorial nexus.” *Id.* Based on this analysis, the SEC ruled, whistleblower awards would be appropriate where a whistleblower’s information leads to a successful enforcement action, brought in the United States, by a U.S. regulatory agency, which is enforcing U.S. securities laws. *Id.* In short, international whistleblowers are eligible for awards where their information leads to a successful SEC enforcement action.

¹² Section 922 of the Dodd-Frank Act amends the Securities Exchange Act of 1934 (“the Exchange Act”) to add a Section 21F, which directs the SEC to establish the SEC Whistleblower Program.

another of the agencies listed above had directed an inquiry or request to his employer and not to him individually. Given that such requests or demands are often drafted so as to arguably apply to a large number of employees (and to broad categories of information), this reading of “voluntary” would have barred many corporate employees from participation in the program. The final rules make it clear that a whistleblower will be deemed to have submitted information “voluntarily” as long as an official inquiry is not directed to him as an individual. *Id.*

If the whistleblower is obligated to report his information to the SEC as a result of a pre-existing duty to the commission or to one of the other entities described above, whether by contract or by court or administrative order, his information will not be considered voluntary and he will not be entitled to an award. Rule 21F-4(a)(3). This disqualification is not triggered by an employee’s contractual obligation to his employer or another third party, Adopting Release at 36-37, or by the employee’s receipt of a request for the same or related information from his employer as part of an internal investigation. *Id.* at 35. This means that an employer cannot remove the incentives that are key to the whistleblower program’s effectiveness by simply requiring all employees to sign agreements requiring them to report any perceived securities violations to the SEC.

Notwithstanding the rule that whistleblowers can provide information to the SEC “voluntarily” only if they do so before receiving requests for the same from the SEC or certain other agencies, the SEC surprised many observers when it demonstrated that it would waive this restriction under certain circumstances. On July 31, 2014, the SEC awarded \$400,000 to a whistleblower who had not come forward “voluntarily” as provided for in the rules because a self-regulatory organization (“SRO”) had earlier requested the information from the whistleblower. As the SEC’s order making the award pointed out, however, the whistleblower had gone out of his way to raise the issues internally and had made every effort to have the company address them before turning to the SEC after the company refused.¹³ The SEC further found that the whistleblower had first identified the violations and tried to persuade his employer to remedy them, and that he believed that a third party had then relayed all of the whistleblower’s information to the SRO. Under these “materially significant extenuating circumstances,” the SEC found waiver of the “voluntary” requirement of Rule 21F-4(a) to be “in the public interest and consistent with the protection of investors.”

The SEC’s decision to waive the “voluntary” requirement in this case is particularly noteworthy because it reflects the Commission’s willingness to use its full authority under the Exchange Act to reward individuals who show courage and determination in helping the Enforcement Division undertake a more prompt and effective investigation of serious securities violations than would otherwise have been possible. As authority for its decision to waive the “voluntary” requirement, the SEC relied on Section 36(a) of the Exchange Act, 15 U.S.C. § 77mm, which allows the Commission to “conditionally or unconditionally exempt any person ... or transaction” from a provision, rule or regulation of the securities laws “to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.” The SEC’s application of the same exemptive authority to the issuance of

¹³ See Press Release No. 2014-154, with a link to the Commission’s order, at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542578457#.U9qeu_ldXxo.

whistleblower awards that it has applied in the regulation of issuers and financial advisors will strengthen the whistleblower program, as it will let would-be whistleblowers know that the SEC and its staff will do what they intend to reward individuals who assist in enforcing the nation's securities laws.

2. “Original Information”

In order to qualify as “original information” that will support a claim for an award, the whistleblower's tip must consist of information that is: 1) derived from the individual's “independent knowledge” or “independent analysis”; 2) not already known to the SEC from any other source (unless the whistleblower is the original source of the information, such as where she had reported the information first to the Department of Justice or Department of Labor,¹⁴ which had passed the information on to the SEC); and 3) not “exclusively derived” from certain public sources such as government reports, hearings, audits or investigations, or the news media, unless the whistleblower is a source of the information contained therein. Rule 21F-4(b)(1).

Independent Knowledge and Independent Analysis

Rule 21F-4(b)(2) defines “independent knowledge” simply as “factual information ... this is not derived from publicly available sources.” The whistleblower may have observed the facts first-hand, but may also acquire the knowledge through her “experiences” or communications. This suggests that the whistleblower can have “independent knowledge” of facts despite having learned them from someone else such as a co-worker, customer or client, as long as that third person is not a company attorney, compliance officer or other representative who would usually be ineligible for a reward under Rule 21F-4(b)(4), discussed below.

In declining to heed the warning of business-side commentators that allowing tips based on third-party information would encourage frivolous claims, the SEC noted when issuing the final rules that excluding such information could deprive the Commission of highly probative information that could aid significantly in an enforcement action. Adopting Release at 47. The SEC pointed out that Congress had recently amended the False Claims Act to remove a similar requirement that a *qui tam* relator possess “direct” (or first-hand) knowledge of the facts. *Id.* n. 104.

“Independent analysis” refers to a whistleblower's “examination and evaluation,” conducted by herself or with others, of information that might be publicly available if the

¹⁴ When an employee files a charge with OSHA claiming unlawful retaliation under Section 806 of the Sarbanes Oxley Act, 18 U.S.C. § 1514A, OSHA sends a copy to the SEC as required by 29 C.F.R. § 1980.104(a). SOX prohibits retaliation against employees for raising concerns about violations of securities laws and some other laws, so these retaliation complaints often allege describe securities violations as the basis for the “protected activity” under SOX. In this author's experience, the SEC's review of SOX retaliation charges filed with OSHA is leading to far more calls from the SEC seeking additional information, and to more investigations than in the years prior to the start of the whistleblower program. The facts and analysis contained in a SOX retaliation charge filed with OSHA should qualify as “original information” under the SEC rules as long as the whistleblower also submits a TCR form with SEC incorporating that information.

analysis reveals additional information that is not “generally known or available to the public.” Rule 21F-4(b)(3). This might include, for example, expert analysis of data that could significantly advance an investigation. Adopting Release at 51.

Exclusions from Independent Knowledge and Analysis

Consistent with its goal of promoting enforcement of securities laws while also encouraging corporate efforts to maintain effective corporate-governance and internal-compliance programs, the SEC has designated information in the possession of certain categories of individuals as not being derived from independent knowledge or analysis, making these individuals presumptively ineligible for participation in the whistleblower-reward program. Two of the exclusions that are carved out apply specifically to attorneys, both in-house and retained, and to non-attorneys who possess privileged information. The rules exclude:

- Information obtained through a communication subject to attorney-client privilege, unless disclosure would be permitted due to waiver or by a rule of the SEC or state rules governing attorneys, Rule 21F-4(b)(4)(i); and
- Information obtained in connection with the whistleblower’s (or her firm’s) legal representation of a client, unless disclosure would be permitted as described above, Rule 21F-4(b)(4)(ii).

Lawyers who are considering providing the SEC with information about securities violations need to be particularly careful, as they may also run afoul of ethical prohibitions even if they would otherwise qualify under a rule of practice before the SEC. For example, the Professional Ethics Committee of the New York County Lawyers Association has issued a bar opinion stating that New York’s rules of professional conduct prohibit attorneys from collecting SEC awards, and presumably other “bounties,” based on the confidential information of a client.¹⁵ An article in the *Wall Street Journal* detailed the escalating dispute between one such attorney and his former employer, Vanguard Group, in a case arising in Pennsylvania.¹⁶ The former in-house attorney took confidential documents that he believed showed a pattern of tax evasion by the company, and used them in filing both an SEC tip and a *qui tam* case in New York state court. Vanguard accused the attorney of violating state bar rules and other obligations and has threatened to sue, and the attorney has asked the SEC to intervene in the matter to address this threat of what he calls unlawful retaliation.

In addition to lawyers, the rules also make certain other individuals ineligible to receive awards in most circumstances because of their roles, formal or otherwise, in the internal compliance functions that the SEC believes are critical to the overall goal of increased adherence

¹⁵ See New York County Lawyers Association, Ethics Opinion 746, Ethical Conflicts Caused by Lawyers as Whistleblowers under the Dodd-Frank Act of 2010 (Oct. 7, 2013).

¹⁶ See K. Grind and J. Eaglesham, “Vanguard Case Tests Rights of Lawyer Whistleblowers” (Aug. 8, 2014), <http://online.wsj.com/articles/vanguard-case-tests-rights-of-lawyer-whistleblowers-1407519518>.

to securities laws. Rule 21F-4(b)(4)(iii). The SEC deems information to lack “independent knowledge or analysis” where the person obtains the information because she is:

- An officer, director, trustee or partner who learns the information in connection with the entity’s processes for identifying and addressing unlawful conduct, Rule 21F-4(b)(4)(iii)(A);
- An employee or contractor whose principal duties are in compliance or internal audit, Rule 21F-4(b)(4)(iii)(B);
- Employed by a firm retained to investigate possible violations of the law, Rule 21F-4(b)(4)(iii)(C); or
- Employed by a public accounting firm performing an engagement required by federal securities laws, who, through the engagement, obtains information about a violation by the engagement client, Rule 21F-4(b)(4)(iii)(D).

Persons who learn information second-hand from these categories of persons will also not be considered to be providing “original information” if they turn around and report the information to the SEC. Rule 21F-4(b)(4)(vi). Individuals who obtain information for a tip using methods that a court finds to have violated criminal laws are excluded as well. Rule 21F-4(b)(4)(iv).

The four non-attorney exclusions described above – those for upper-level management, compliance personnel and auditors serving in the roles set forth in Rule 21F-4(b)(4)(iii) – do not apply in all circumstances. The wording of the rules suggests that these persons might have “independent knowledge” as long as they obtain their information outside their roles in compliance, investigation or audit. In addition, these exclusions do not apply, and the person can be eligible for an award, where at least one of the following conditions is present:

- The would-be whistleblower “reasonably believes” that disclosure to the SEC is needed to prevent “substantial injury” to the entity or investors, Rule 21F-4(b)(4)(v)(A);
- The would-be whistleblower “reasonably believes” that the entity is acting in a way that would impede an investigation of the violations, Rule 21F-4(b)(4)(v)(B); or
- At least 120 days have passed since the whistleblower reported her information internally to the audit committee, chief legal officer or other appropriate official of the entity, or since she obtained the information under circumstance indicating that those officials were already aware of the information, Rule 21F-4(b)(4)(v)(C).

The SEC first applied one of these exemptions on August 29, 2013, when it issued a whistleblower award of more than \$300,000 to an employee who performed audit and compliance functions. In that case, the whistleblower reported the securities violations internally, gave the company at least 120 days to take action, and then reported the same information to the SEC when the company did not act to address the violations. This entitled the

whistleblower to claim an award under the 120-day exemption set forth in Rule 21F-4(b)(4)(v)(C).¹⁷

The payment of an award to an employee serving in a compliance function marks an important development for the SEC Whistleblower Program, as it shows that the door is open for the submission of tips from categories of employees who are often the best-positioned to observe their employers' securities violations. Here the employee did exactly what Congress intended the program to encourage: he reported the violations internally, acted responsibly by giving the company four months to address them, and then turned to the SEC when the company failed to act. By paying the employee an award for his actions, the SEC has ensured that more employees who work in compliance and audit functions will come forward, and will do so in compliance with the 120-day exemption that allows them to claim awards.

The SEC's determination in the case of this compliance professional also demonstrates how the program rules strike a reasonable balance between the public's need for strict enforcement and the interests of corporations (and their shareholders) in maintaining effective legal, compliance and audit functions that can avoid the need for SEC enforcement action. While generally excluding information from employees who staff these functions will mean that the SEC will never hear from some would-be whistleblowers who have credible knowledge of securities violations, the rules ensure that even these individuals can report their information to the SEC and become eligible for an award in certain situations.¹⁸ Where the wrongful conduct is seriously endangering investors, where the entity is destroying evidence, or where upper management have known about the problem for four months or more, the SEC will accept the non-attorney's whistleblower's original information despite her role as a compliance professional. Corporations thus face the risk that even those employees whom they have entrusted with the most damning knowledge of securities violations can earn awards under the SEC whistleblower program. The only way a corporation can mitigate that risk is to make sure it maintains effective and efficient mechanisms for responding promptly to suspected securities violations.

In deciding where to draw the line between those who can earn an award for blowing the whistle on securities violations and those who cannot, the SEC rejected proposals that would have excluded many more, perhaps even most, of those individuals who are most likely able to provide the commission with high-quality tips. As originally proposed, the rules excluded from "independent knowledge" and "independent analysis" any information obtained not just by

¹⁷ See Press Release No. 2014-180 (Aug. 29, 2014), at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542799812#.VACeEfldXxo>, and the accompanying Order Determining Whistleblower Award Claim (Release No. 72947, Aug. 29, 2014), at <http://www.sec.gov/rules/other/2014/34-72947.pdf>. The Commission awarded the employee 20% of the more than \$1,500,000 it recovered from the wrongdoers. *Id.*

¹⁸ Whistleblower Office Chief Sean McKessy's speech at Georgetown University explains in greater detail the exclusions, and the exceptions to the exclusions, that apply to certain categories of individuals, and also sheds light on the policy considerations that frame the exclusions. See <http://www.sec.gov/news/speech/2011/spch081111sxm.htm>.

officers, directors, trustees and partners, but also by anyone with “supervisory” or “governance” responsibilities who was given the information with the expectation that they would do something about it. *See* Adopting Release at 64. The proposed rules also required such persons to wait a “reasonable time” (as opposed to 120 days) before reporting to the SEC.

These proposals drew intense criticism from whistleblower advocates, who pointed out correctly that excluding all “supervisory” personnel would effectively undermine the program. The whistleblower bar also criticized the rule as being so vague as to ensure that few supervisors would risk their positions to report to the SEC. At the same time, SEC’s proposed exclusion of some employees with governance responsibilities emboldened big-business interests to call for extending the ban to all variety of positions in operations, finance, technology, credit, risk, product management, and on and on. In the end, the SEC struck a fair balance,¹⁹ adopting narrow exclusions for core, compliance-related personnel and processes while rejecting pressure to deny eligibility to far more employees than Congress could possibly have intended or anticipated. Those exemptions are now leading to successful enforcement actions.

B. Rules Designed to Incentivize Internal Reporting

The SEC rules repeatedly make clear that the main purpose of the whistleblower program is to encourage individuals to provide high-quality tips to the Commission. The SEC notes in the Adopting Release at 105 that:

...the broad objective of the whistleblower program is to enhance the Commission’s law enforcement operations by increasing the financial incentives for reporting and lowering the costs and barriers to potential whistleblowers, so that they are more inclined to provide the Commission with timely, useful information that the Commission might not otherwise have received.

With this purpose in mind, the SEC rejected the business lobby’s near-unanimous insistence that it require whistleblowers submit their complaints internally before filing them with the SEC. *Id.* at 103. “[W]hile internal compliance programs are valuable,” the Commission observed, “they not substitutes for strong law enforcement. *Id.* at 104. The Adopting Release recognizes that whistleblowers might reasonably fear retaliation for raising their concerns, and also notes that law enforcement interests are sometimes better served when the Commission can launch an investigation before the alleged wrongdoers learn about it and are able to destroy evidence or tamper with potential witnesses. *Id.* For these and related reasons, the SEC leaves it to each whistleblower to decide whether to report first internally or to the SEC. *Id.* at 91 – 92.²⁰

¹⁹ *See* Adopting Release at 90 – 92 for the SEC’s most comprehensive explanation of these competing interests and how the Commission weighed them in developing the final rules.

²⁰ In the view of the author, who has specialized in the representation of corporate whistleblowers for many years, the business community’s fears of a rush to report improprieties to regulators has proven to be unfounded. In fact, the writer has observed that very few employees, current or former, report their concerns to the SEC without having first reported them internally. A 2013 survey by the Ethics Resource Center confirms that the nine out of ten whistleblowers report their concerns internally as a first step in attempting to correct perceived

At the same time, the Commission included several provisions in the rules that are expressly designed to incentivize whistleblowers to utilize internal compliance programs. These include:

- Affording whistleblower status to the individual as of the date he reports the information internally, as long as the he provides the same information to the SEC within 120 days. This allows an employee to report internally while preserving his “place in line” for an award from the SEC for 120 days, even if another whistleblower provides the same or related information to the Commission in the interim. Rule 21F-4(b)(7).
- Giving a whistleblower full credit for information provided by his employer to the SEC where the employee reports the information internally and the employer then investigates and “self-reports” that information (and even additional information that the whistleblower may not have had) to the SEC, and where the information supplied by the employer “leads” to a successful enforcement action. Rule 21F-4(c)(3). Whistleblower Office Chief Sean McKessy explained the benefit to the whistleblower in his Georgetown speech in 2011: “[T]he percentage of the award to the employee could be increased based on the enhanced quality and value of the information uncovered by the company’s internal investigation. So the same employee that reported the ‘tip of the iceberg’ – something is wrong – gets the benefit of the full iceberg – everything that the internal investigation uncovered.”²¹
- Treating a whistleblower’s participation in an internal compliance and reporting system as a positive factor in determining the amount of an award on the scale of 10% to 30%. Rule 21 F-6(a)(4). Conversely, a whistleblower’s interference with internal compliance and reporting may decrease the amount of the award. Rule 21 F-6(b)(3).

These rules provide flexibility to the whistleblower, who the SEC believes is the best position to determine the effectiveness or ineffectiveness of the internal compliance system, in choosing how to report violations. *See* Adopting Release at 103. The rules enhance the SEC’s law enforcement operations by encouraging people who may otherwise be deterred to report violations. This group includes those who will be persuaded to use the internal compliance programs because of new financial incentives who may not have done so otherwise, as well as those who will report directly to the SEC who may not have reported any violations at all if required to go to the company first. *Id.*

The SEC also points out that the rules’ incentives to employees to report internally are likely to encourage companies to create and maintain effective internal compliance programs, as whistleblowers are more likely to participate in such a program. *Id.* at 104. Maintaining an

illegalities. *See* “National Business Ethics Survey of the U.S. Workforce,” Ethics Resource Center 2014, available at <http://www.ethics.org/downloads/2013NBESFinalWeb.pdf>, at 29-30.

²¹ See <http://www.sec.gov/news/speech/2011/spch081111sxm.htm>

effective program is in the best interests of a company because, as the SEC has in past enforcement actions, the Commission will often, upon receiving reports of a violation, notify the company and give it an opportunity to investigate the issue. In deciding whether to give a company that opportunity, the SEC will consider the company's "existing culture related to corporate governance," and, in particular, the effectiveness of the company's internal compliance programs. *Id.* at 92 n. 197.

C. Information that Leads to Successful Enforcement

The final rules clarify the standard for determining when a whistleblower's information has led to a successful investigation, entitling her to an award if the action results in monetary sanctions exceeding \$1,000,000. When information concerns conduct not already under investigation or examination by the SEC, it will be considered to have led to successful enforcement if:

- It is "sufficiently specific, credible, and timely" to cause the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, Rule 21 F-4(c)(1); and
- The Commission brings a successful judicial or administrative action based in whole or in part on the conduct identified in the original information. Rule 21 F-4(c)(1).

The standard is somewhat higher for information concerning conduct already under investigation or examination. Information will be deemed to have led to successful enforcement if it "significantly contributed" to the success of the action. Rule F-4(c)(2). In determining whether information "significantly contributed" to the success of an investigation, the Commission will consider whether the information allowed the SEC to bring a successful action in significantly less time or with significantly fewer resources, bring additional successful claims, or take action against additional parties. *See* Adopting Release at 100. The SEC has denied a number of claims for awards on the grounds that the tip neither led to nor contributed to a successful enforcement action.²²

As discussed above, information reported by a whistleblower internally can also be credited to the whistleblower and deemed to have led to a successful investigation if it conforms to the criteria in Rule 21F-4(c)(1) or (2). Rule 21 F-4(c)(3).

D. Monetary Sanctions Totalling More than \$1 Million

Under the final rule, in determining whether recovery in an enforcement action exceeds the \$1,000,000 threshold, the word "action" generally means a single judicial or administrative proceeding. Rule 21 F-4(d). However, in certain circumstances actions can be aggregated. The SEC adopted this broad interpretation of the term "action" in accordance with congressional

²² *See* Final Orders Determining Whistleblower Award Claims, at <http://www.sec.gov/about/offices/owb/owb-final-orders.shtml>.

intent to increase the incentives for employees to report violations. Actions may include cases from two or more administrative or judicial proceedings that arise out of a common nucleus of operative facts, and any follow-on proceedings arising out of the same nucleus of operative facts may be aggregated as well. Rule 21 F-4(d)(1). Factors that may be taken into account when determining whether two or more proceedings arise from the same nucleus of operative facts include parties, factual allegations, alleged violations of federal securities laws, or transactions and occurrences. *See* Adopting Release at 110.

Where the SEC has brought a successful enforcement action, the SEC will also issue awards based on amounts collected in “related actions” brought by the Attorney General of the U.S., certain regulatory authorities and self-regulatory organizations, and state attorneys general under certain circumstances. Rule 21F-3. The rule regarding related actions is discussed in detail in the Adopting Release at 20 – 24.

E. SEC Procedures for Submitting a Tip and Claiming an Award

The program rules describe a straightforward set of procedures for the submission of original information about possible securities violations to the SEC Office of the Whistleblower. An individual must file a Tip, Complaint or Referral (“TCR”) form provided by the SEC, and can file either online or by mailing or faxing the same to the SEC. Rule 21F-9(a). The rules require the individual to declare, under penalty of perjury, that the information he is providing in the TCR form is true and correct to the best of his knowledge and belief. Rule 21F-9(b).

Given the very real risks of retaliation from their employers and the risk of reputational harm that would interfere with future job prospects, many whistleblowers desire to submit their information to the SEC anonymously. The program rules allow whistleblowers to file their submissions anonymously provided that they do so through counsel. Rule 21F-9(c). The attorney submits the TCR form without the whistleblower’s identity or signature, and certifies that he has verified the whistleblower’s identity, has reviewed a version of the TCR form signed by the whistleblower and that the information is true and correct, and has obtained the whistleblower’s non-waivable consent to provide that document to the SEC if Commission staff have reason to believe the whistleblower has willfully provided false information. *Id.*

The SEC vows to protect whistleblowers’ identities “to the fullest extent possible” regardless of whether they submit their information anonymously, but it acknowledges that there are limits to its ability to shield a whistleblower’s identity. “[I]n an administrative or court proceeding,” the SEC website explains, “we may be required to produce documents or other information which would reveal your identity.”²³

While the SEC cannot provide a 100% guarantee that no one will uncover a whistleblower’s identity during the course of investigation and enforcement action, this author remains confident that the risk of public disclosure is relatively small. A few whistleblowers to date have self-identified to the media, a number have likely self-identified to their employers as a means to secure maximum protection against retaliation, and in one case a court has ordered the SEC to hand over an anonymously filed TCR form (although without the whistleblower’s name)

²³ *See* FAQ No. 10 at http://www.sec.gov/about/offices/owb/owb-faq.shtml#P19_5641.

to counsel defending a corporation in an SEC enforcement action.²⁴ SEC staff have demonstrated, however, that they will go to great lengths to protect a whistleblower's identity at every stage of the process, from receiving an anonymous tip, to carefully conducting an investigation and with input from the whistleblower and counsel about how best to protect the whistleblower's identity, to announcing whistleblower awards. Even in the event that the SEC is forced to disclose a whistleblower's identity in the course a legal proceeding, it is likely that the SEC and the courts will be able to take effective steps to prevent the disclosure from becoming public.

F. Determining the Amount of an Award

The final rules reiterate that the amount of a whistleblower's award is within the sole discretion of the Commission as long as the award falls within the 10% to 30% range that Congress established in the Dodd-Frank Act. Rule 21F-5. The total award cannot exceed 30% limit even where the Commission distributes the award to more than one whistleblower. *Id.*

The final rules set forth a number of factors that the SEC may consider when calculating the final award. Factors that might increase an award include participation by the whistleblower in an internal compliance system, the significance of information provided by the whistleblower, the degree of assistance provided by the whistleblower, and the SEC's programmatic interest in the particular securities violations at issue.²⁵ Rule 21 F-6(a)(1)-(4). Factors that might decrease an award include the culpability of the whistleblower in the wrongdoing, unreasonable reporting delay, or interference with internal compliance and reporting systems. Rule 21 F-6(b)(1)-(3). In short, the rules enable a whistleblower to maximize his or her award by reporting violations timely and effectively, using internal channels where practical, and assisting the SEC as needed.

²⁴ See Opinion and Order, *SEC v. Yorkville Advisors, LLC, et al.*, No. 12-cv-7728 (S.D.N.Y. May 27, 2014) (opinion and order granting in part and denying in part motion to compel production of documents).

²⁵ The SEC's description of its law-enforcement interests provides some guidance to practitioners who are assessing the Commission's likely response to a given "tip." Key to the SEC's response will be, *inter alia*, whether the conduct at issue involves an industry-wide practice, Rule 21F-6(a)(3)(iii); the type, severity, duration and isolated or ongoing nature of the violations, *id.*; the danger to investors "and others," Rule 21F-6(a)(3)(iv); and the number of entities and individuals who have suffered harm. *Id.*

Unreasonable delay in reporting suspected securities violations recently cost one whistleblower millions of dollars in award money. On September 22, 2014, the SEC announced its largest award to date – \$30 million to an overseas whistleblower whose information allowed the SEC to stop an ongoing fraud that would otherwise have gone undetected.²⁶ In its order determining the award, the SEC explained that it had adjusted the whistleblower’s award downward because the whistleblower had delayed reporting a serious fraud for a period long enough to allow additional investors to be harmed.²⁷ The whistleblower’s explanation for the delay was that the whistleblower was unsure whether the SEC would take action on the information provided. The SEC found this to constitute unreasonable delay, and reduced the award percentage significantly. Noting that no other award determination to date had involved such an unreasonable delay, the SEC stated in its order that it would have reduced the award even further had it not been for the fact that some of the delay occurred before the inception of the SEC Whistleblower Program. This suggests that the SEC awarded the whistleblower somewhat more than the statutory minimum of 10% of collected proceeds, but well below the 25% average of other awards made to date, as the whistleblower pointed out when challenging the award.

The rules also balance concerns about culpable whistleblowers receiving awards with the understanding that, at times, those with the best access to information may have participated in wrongdoing at some level. In order to incentivize such whistleblowers to come forward with securities violations, the rules do not exclude culpable whistleblowers from awards altogether, but they do prevent them from recovering from their own misconduct. This means that in determining whether the whistleblower has met the \$1,000,000 threshold and in calculating an award, the SEC will exclude any monetary sanctions that the whistleblower is ordered to pay individually or that an entity is ordered to pay based substantially on the conduct of the whistleblower. Rule 21F-16. The rule thus allows culpable whistleblowers, who may be uniquely situated to provide information regarding securities violations, to come forward while not creating incentives that would encourage them to engage in securities violations.

G. Whistleblower Awards to Date.

As of September 1, 2014, the Office of the Whistleblower has issued 27 orders determining claims for whistleblower awards, with ten of those orders making awards to 14 whistleblowers and 17 of the orders denying awards. Awards have ranged from less than \$50,000 to \$30,000,000, and have been issued in enforcement actions focusing on a variety of securities violations. The following chart summarizes the awards made to date based on that information the SEC has made public:

²⁶ See SEC Press Release No. 2014-206 (Sept. 22, 2014), at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#.VCDTjPldU0F>

²⁷ See Order Determining Whistleblower Award Claim, Release No. 73174 (Sept. 22, 2014), at <http://www.sec.gov/rules/other/2014/34-73174.pdf>.

Date	Release Nos. ²⁸	Award Total	%	Allocation	Notes from SEC Press Releases and Orders Determining Awards
Aug. 21, 2012	67698; 2012-162	\$50,000	30%	All to one claimant	Whistleblower helped prevent “multi-million dollar fraud” from “ensnaring additional victims”; SEC later paid an additional \$150,000 after further collections, for a total of \$200,000.
June 12, 2013	69749 See note	\$125,000	15%	5% each to three claimants	In two awards, SEC paid three whistleblowers 15% of \$845,000 that SEC and DOJ collected on \$10,000,000 penalty against sham hedge fund. June 12 announcement at http://www.sec.gov/news/press/2013/2013-06-announcement.htm
Aug. 30, 2013	70293; 2013-169		15%	5% to each of three claimants	
Sept. 30, 2013	70544; 2013-209	\$14 million	30%	All to one claimant	Information allowed recovery of “substantial investor funds ... more quickly than otherwise would have been possible.”
Oct. 30, 2013	70775; 2013-231	\$150,000	30%	100% to one claimant	SEC investigated fraud scheme and “obtain emergency relief before additional investors were harmed.”
June 3, 2013	72301; 2014-113	\$875,000	30%	15% each to two claimants	Information allowed SEC to “bring a successful enforcement action in a complex area of the securities market.”
July 22, 2014	72652	?	30%	15%, 10%, 5% to three claimants	Amount not disclosed by SEC
July 31, 2014	72727; 2014-154	\$400,000	25%	All to one claimant ²⁹	SEC waived “voluntary” requirement where employee tried diligently to have company address violations
Aug. 29, 2014	72947; 2014-180	\$300,000	20%	All to one claimant	First award to employee working in compliance and audit function
Sept. 22, 2014	73174; 2014-206	\$30 million	?	All to one claimant	Largest award to date, to foreign resident working outside U.S.; award percentage decreased by “unreasonable delay” in reporting violations

²⁸ The top numbers refer to the numbered orders in the SEC’s database of final orders determining awards, at <http://www.sec.gov/about/offices/owb/owb-final-orders.shtml>; “Press Release” numbers refer to the SEC press releases announcing awards, available at <http://www.sec.gov/News/Page/List/Page/1356125649507>.

²⁹ The SEC did not report the percentage in its press release or accompanying order. However, the whistleblower later sat for a newspaper interview and reported that he had received 25% of a \$1.6 million penalty. See J. Nocera, “The Man Who Blew the Whistle,” *New York Times* (Aug. 18, 2014).

The awards listed above mark a very encouraging start to the SEC Whistleblower Program as viewed from the whistleblower perspective. They make clear that the program is honoring its commitment to reward individuals who come forward with helpful information about securities violations, sometimes at great risk to their careers. Based on available data, it appears that the Commission willing to:

- set award amounts relatively high within the allowable range, at an average so far of 25% of sanctions imposed;
- pay whistleblowers in installments as the government recovers additional sanctions and penalties from respondents;
- use the Commission's authority to waive program requirements where needed to serve the interests of investors;
- apply the exemptions that allow employees serving in audit and compliance functions to participate under certain conditions;
- protect whistleblowers' identities from public disclosure by disclosing little information about the underlying enforcement actions; and
- allow whistleblowers to challenge the amounts of their awards and give fair consideration to the arguments the whistleblowers raise.³⁰

Based on these results of the SEC Whistleblower Program to date, whistleblowers and their counsel can be sure that many more awards, and much larger ones, are soon to be forthcoming. The SEC has been accepting tips for only four years, the SEC Office of the Whistleblower has been in operation for less than four years, and SEC investigations normally take from two to four years, in some cases more, to reach completion. It is a fair assumption that a growing number of successful enforcement actions of all varieties and sizes will have begun with a tip from a whistleblower.

³⁰ The SEC discloses limited information when issuing awards in order to protect the identity of whistleblowers, both those who have filed their tips anonymously and those who have filed without requesting anonymity. The SEC's guarded approach to disclosing such information is warranted because it minimizes the chances that a whistleblower's identity will become public, and that is a critical concern of would-be whistleblowers on whom the success of the program depends. However, unlike court and agency decisions that normally allow the public to fully understand the bases for government action, the SEC's orders determining most claims for whistleblower awards without citing the underlying enforcement action, without disclosing the name of the respondent, and often without revealing nature of the industry or the details of the misconduct involved. For this reason, practitioners will need to read the SEC orders carefully in order to use them effectively as guides to participation in the whistleblower program and as legal precedent for use in preparing tips, aiding the SEC in investigations, and claiming awards.

H. Claiming a Whistleblower Award

The SEC posts “Notices of Covered Actions” for each Commission action in which a final judgment or order, by itself or together with prior judgments or orders in the same action issued after July 21, 2010, results in monetary sanctions exceeding \$1 million.³¹ The inclusion of a notice on the website means only that an order was entered with monetary sanctions exceeding \$1 million. It does not mean that a whistleblower tip led to the investigation or enforcement action, or that the SEC will pay an award to a whistleblower in connection with the case.

Once a notice is posted, anyone claiming entitlement to a whistleblower award in connection with the action has 90 days to apply for an award. A whistleblower must apply for an award by submitting a completed Form WB-APP to the Office of the Whistleblower by midnight on the claim due date, and the SEC has denied several claims for not meeting this deadline.³² A whistleblower who has submitted his or her tip anonymously must disclose his or her identity to the SEC prior to the payment of an award. *See* 17 C.F.R. § 240.21F-10.

III. Protection Against Retaliation

Firings, demotions and other acts of retaliation against employees who blow the whistle on employer misconduct are all too common. In fact, in a recent survey of more than 6,400 employees working in the for-profit sector, the Ethics Resource Center found that 21% of responding employees who had reported misconduct said that they had suffered some form of retribution as a result of their actions.³³ Individuals who contact lawyers in search of legal representation before the SEC Whistleblower Program fall into this category at least as often as not, and in many cases are still reeling from a recent and sudden firing when they first meet with a lawyer. Some contact a lawyer for the purpose of challenging their wrongful termination, and learn only during the consultation that the conduct that they reported to their company, leading to their termination, could form the basis for an important, timely and potentially lucrative tip to the SEC.

³¹ *See* <http://www.sec.gov/about/offices/owb/owb-awards.shtml>.

³² On July 23, 2014, for example, the SEC denied a whistleblower’s claims for awards in connection for two covered actions, which the whistleblower submitted more than three months after the expiration of the 90-day claims window. *See* Order Determining Award Claim (Release No. 72659, July 23, 2014), at <http://www.sec.gov/rules/other/2014/34-72659.pdf>. The SEC rejected the claimant’s explanation that the claimant was unaware of the Notices of Covered Actions on the SEC’s website, and found that the claimant had not demonstrated the “extraordinary circumstances” required under Rule 21F-8(a) for waiver of the filing deadline.

³³ *See* Ethics Resource Center, “National Business Ethics Survey of the U.S. Workforce 2013,” available at <http://www.ethics.org/downloads/2013NBESFinalWeb.pdf>.

The Dodd-Frank Act and the SEC Whistleblower Program have significantly expanded whistleblower protections for employees who face retaliation for raising concerns about fraud, securities violations and related wrongdoing by their employers. The Dodd-Frank Act amends the employee-protection provisions of the Sarbanes-Oxley Act (“SOX”), 18 U.S.C. § 1514A, to make them more favorable to employees; creates a new cause of action that a whistleblowing employee can bring in federal court; and, as implemented by the SEC’s final rules for the whistleblower program, allows the Commission to use its enforcement powers to hold employers accountable for retaliation. The SEC has recently invoked this power, bringing a successful enforcement action against a company that retaliated against an employee who reported securities violations to the Commission. Practitioners who represent employee-whistleblowers before the SEC will want to familiarize themselves with applicable anti-retaliation laws and the SEC’s recent action, discussed below, as their clients are likely to face retaliation, including loss of their jobs, for reporting their employers’ securities violations.

A. Amendments to SOX and the *Lawson* Decision

Section 806 of SOX protects employees of publicly traded companies from retaliation by their employers for reporting certain types of fraud, including fraud on shareholders, and other securities violations. The amendments to SOX Section 806 are in Section 21F(c) of the Dodd-Frank Act, which increases the SOX statute of limitations from 90 days to 180 days, provides for jury trials in SOX cases brought in federal court, and invalidates pre-dispute arbitration agreements to the extent they purport to apply to SOX retaliation claims.

Section 929A of the Dodd-Frank Act also expands SOX 806’s coverage to include subsidiary entities whose financial information is included in a publicly traded parent’s consolidated financial statements. 18 U.S.C. § 1514A(a). The ARB has issued several opinions post-Dodd Frank finding that this § 929A standard applies to cases filed pre-Dodd Frank or where the adverse action took place pre-Dodd Frank. Generally, these cases have held that § 929A was a clarification of Section 806’s existing law. *See Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (Mar. 31, 2011); *Merton v. Berkshire Hathaway, Inc.*, ARB No. 09-025, ALJ No. 2008-SOX-40 (ARB June 16, 2011) (ARB vacated decision and remanded to ALJ to determine liability consistent with *Johnson*); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18 (June 28, 2011).

The Southern District of New York has held in two cases that § 929A applies even in cases where the employee plaintiff was retaliated against or filed suit prior to the Dodd Frank Act’s enactment in 2010. *See Leshinsky v. Telvent GIT, S.A., et al.*, 873 F. Supp.2d 582 (S.D.N.Y. 2012) (order denying defendants’ motion to dismiss); *Ashmore v. CGI Group Inc. and CGI Federal Inc.*, No. 1:11-cv-08611, 2012 WL 2148899 (S.D.N.Y. June 12, 2012).

Courts have reached differing conclusions on the question of whether the provision voiding pre-dispute arbitration agreements applies retroactively. In *Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225 (D. Mass. 2011), the court held that this pre-dispute arbitration provision of the Dodd-Frank Act did apply retroactively, holding that Congress’s intent was unclear on this point and that the presumption against retroactivity did not prohibit the statute from being applied retroactively because the arbitration ban was in essence a jurisdictional statute. *Id.* at 223; *see also Wong v. CKX, Inc.*, 890 F. Supp.2d 411, 422 (S.D.N.Y. 2012). But

other courts have held that this provision is not retroactive. *See, e.g., Khazin v. TD Ameritrade Holding Corp.*, No.13-4149, 2014 WL 940703, at *8 (D.N.J. Mar. 11, 2014); *Taylor v. Fannie Mae*, 839 F. Supp.2d 259, 263-64 (D.D.C. 2012); *Holmes v. Air Liquide USA LLC*, Civ. Action No. H-11-2580, 2012 WL 267194 (S.D. Tex. Jan. 30, 2012); *Henderson v. Masco Framing Corp.*, No. 3:11-CV-00088, 2011 WL 3022535, at *3-4 (D. Nev. July 22, 2011).

In a landmark decision that is sure to greatly expand the ranks of employees bringing SOX whistleblower claims, the Supreme Court recently decided that SOX 806's coverage extends beyond employees of publicly-traded companies and their subsidiaries to the employees of contractors and of subcontractors of publicly-traded companies. *See Lawson v. FMR LLC*, 134 S. Ct. 1158 (Mar. 4, 2014). In that case the plaintiffs were employees of a company that performed accounting and financial-reporting functions for the Vanguard Group of mutual funds, which itself had no employees. A divided Supreme Court upheld the plaintiffs' right to whistleblower protections, largely because ruling otherwise would have denied millions of mutual-fund shareholders the protection against fraud that only whistleblowers can provide. The court in *Lawson* declined, however, to recognize any limiting principle in SOX's coverage of contractor employees, for now leaving the lower courts to answer questions such as whether the contractor must be engaged in accounting and reporting functions for the publicly traded company, and whether an employee's protected activity must have some connection to fraud on the publicly traded company's shareholders.

The *Lawson* decision has attracted a great deal of attention from both sides of the bar and more widely because it portends a new wave of litigation from employees, including lawyers, accountants and other professionals whose firms provide advisory and other services to publicly traded companies. In fact, the dissenting justices in *Lawson*, and later corporate interests and the defense bar, have warned that the Supreme Court has now opened the door to lawsuits that have nothing to do with the activities of publicly traded companies, including babysitters, nannies and gardeners who get fired for reporting their boss's teenager for perceived Internet fraud.

One federal district court has recently made clear that these types of cases will not easily make it through the courts. In *Gibney v. Evolution Mktg. Research, LLC*, No. 14-1913, 2014 WL 2611213 (E.D. Pa. June 11, 2014), a fired employee sued his former employer under SOX after the employer fired him for complaining that it was overbilling a publicly traded company for which it provided marketing services. Pointing to *Lawson's* emphasis on SOX's goal of preventing fraud by public companies on shareholders, the district court dismissed the employee's claim of retaliation for reporting his employer's billing fraud on the public company having little if any impact on shareholders. *Id.* at *7.

B. New Cause of Action and Internal Reporting

The new cause of action created by the Dodd-Frank Act is set forth in Section 21F(h)(1)(A), which allows "whistleblowers" to sue in federal court if their employers retaliate against them because they:

- i. provide information about their employer to the SEC in accordance with the above-described whistleblower bounty program;

- ii. initiate, testify or assist in any investigation related to the program; or
- iii. make disclosures “required or protected” under the Sarbanes-Oxley Act, the Securities Exchange Act of 1934, or any other law, rule, or regulation under the jurisdiction of the SEC.

A Dodd-Frank retaliation claim may be filed directly in federal court within three years “after the date when facts material to the right of action are known or reasonably should have been known to the employee” (but subject to a maximum of six years). Section 21F(h)(1)(B)(iii). A whistleblower’s remedies include reinstatement, double back pay with interest, attorneys’ fees, and reimbursement of other related litigation expenses. Section 21F(h)(1)(C).

Courts disagree as to whether the statute provides protection to employees who report perceived securities violations internally to their employers but do not report the violations to the SEC. The statute purports to allow claims by “whistleblowers,” which Section 21F(a)(6) of the Act defines as individuals who provide information to the SEC, but another section of the statute protects whistleblowers for making “disclosures that are required or protected” under SOX, which does not require external reporting. 15 U.S.C. § 78u-(h)(1)(A). In short, the law as drafted suggests in one place that reporting to the SEC is required and in another place that internal reporting will suffice.

The question of whether the Dodd-Frank Act’s whistleblower protections cover internal reporting is a critically important question for whistleblowers, as they will otherwise face a difficult choice after discovering securities violations that they believe need addressing. They can report their concerns internally, as the SEC program incentivizes them to do in the hope of earning larger awards, or they can bypass internal compliance channels and take their information directly to the SEC as allowed by the rules. If Dodd-Frank protects only those who choose the latter option and leaves vulnerable those who only report internally, many employees will simply circumvent internal channels and take the safer route. If the ambiguity in the statute causes this to happen on a large scale, it will threaten the delicate balance that the SEC struck when it promulgated the rules governing the program.

The only federal court of appeals to address the issue of whether Dodd-Frank protects internal reporting has held that it does not. In *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 625 (5th Cir. 2013), the Fifth Circuit held, “Under Dodd-Frank’s plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC.” The court declined to defer to the SEC’s interpretation of the statute because it found the plain language to be unambiguous, *id.* at 630, and found that Dodd-Frank “creates a private cause of action only for individuals who provide information ... to the SEC.” *Id.* at 623. The issue was also pending before the Second Circuit for the first half of 2014 in the case of *Liu v. Siemens AG*, but that court avoided the question when it upheld the district court’s dismissal on the grounds that Dodd-Frank’s anti-retaliation provision did not

apply “extraterritorially” to employees like the plaintiff who worked overseas. *See Liu Meng-Lin v. Siemens AG*, No. 13-4385, 2014 WL 3953672 (2nd Cir. Aug. 14, 2014).³⁴

The great majority of federal district courts that have decided this question – even after *Asadi* – have disagreed with the Fifth Circuit and held that subsection (iii) above extends protection to individuals who have not reported to the SEC at the time of the employer’s alleged retaliation. These courts have based their interpretations on subsection (iii)’s protection of disclosures that are “required or protected” by SOX or certain other laws within the jurisdiction of the SEC.³⁵ The holdings in these cases have potentially far-reaching effect as they would allow plaintiffs who have engaged in protected activity under Section 806 of SOX to circumvent the administrative scheme outlined in SOX and to take their claims directly to federal court, and to do so with the benefit of a longer statute of limitations (three years for claims filed in court under the Dodd-Frank Act, Section 21F(h)(1)(B)(iii)(bb), versus 180 days under SOX).

³⁴ In issuing its most recent award in the amount of \$30 million to a foreign whistleblower (discussed in Sec. II.A.1, above at 3 and n. 11,) the SEC acknowledged the Second Circuit’s holding in *Liu* that the anti-retaliation provisions of Dodd-Frank did not apply extraterritorially. However, the SEC found that the *Liu* decision, which found insufficient U.S. territorial nexus to support a retaliation claim, did not limit the SEC’s ability to issue an award to a foreign whistleblower who had provided information leading to a successful enforcement action in the U.S. “[T]he whistleblower award provisions have a different Congressional focus than the anti-retaliation provisions,” the SEC explained in its order, “which are generally focused on preventing retaliatory employment actions and protecting the employment relationship.” Order Determining Whistleblower Award Claim, Release No. 73174 (Sept. 22, 4014), at 2 n. 2.

³⁵ *See Bussing v. COR Clearing, LLC*, No. 12-00238, 2014 WL 2111207 at *6-13 (D. Neb. May 21, 2014) *Yang v. Navigators Group, Inc.*, No. 13-2073, 2014 WL 1870802 (S.D.N.Y. May 8, 2014) *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149, 2014 WL 940703 at *6 (D.N.J. Mar. 11, 2014); *Azim v. Tortoise Capital Advisors, LLC*, No. 13-2267, 2014 WL 707235 at *3 (D.Kan. Feb. 24, 2014); *Rosenblum v. Thompson Reuters*, 984 F. Supp.2d 141 (S.D.N.Y. Oct. 25, 2013); *Ellington v. Giacomakis*, 977 F. Supp.2d 42, 2013 WL 5631046 (D. Mass. Oct. 16, 2013); *Murray v. UBS Sec., LLC*, No. 12-5914, 2013 WL 2190084, at *4 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094 (D. Colo. Mar. 25, 2013); *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 992-95 (M.D. Tenn. 2012); *Kramer v. Trans-Lux Corp.*, No. 3:11-cv-1424, 2012 WL 4444820, at *3-5 (D. Conn. Sept. 25, 2012); *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066 (S.D.N.Y. May 4, 2011). The majority of these courts have opined that while the first two categories of protected activity under the anti-retaliation provision, by their own terms, protect only whistleblowers who report securities to the SEC directly, the third category is silent as to whom the disclosure must be made, and that provision would be rendered meaningless by a construction requiring contact with the SEC. *Bussing, supra* at *7. Two federal district courts have sided with the Fifth Circuit, and have held that the statute is not ambiguous and that it protects whistleblowers from retaliation only where they have reported to the SEC. *See Banko v. Apple, Inc.*, No. 13-02977, 2013 WL 7394596 (N.D. Cal. Sept. 27, 2013); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381, 2013 WL 3786643, at *4 (D. Colo. July 19, 2013).

These district court decisions upholding protections for internal reporting are consistent with SEC Rule 21F-2 and with the Commission's interpretive guidance provided in its comments to the final rule. The SEC states, "[T]he statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the [SEC]." Securities and Exchange Commission, Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300-01 (June 13, 2011) (codified at 17 C.F.R. pts. 240-49). Consistent with its guidance, the SEC filed an *amicus* brief with the Second Circuit in the *Liu* case. The Commission's brief urged the court to find that the Dodd-Frank Act's retaliation provisions protected individuals who reported internally rather than directly to the SEC. Brief for Securities and Exchange Commission as Amicus Curiae Supporting Appellant, *Liu v. Siemens AG*, No. 13-4384 (2d Cir. Feb. 20, 2014). "Today's filing makes clear that under SEC rules," Whistleblower Office Chief Sean McKessy said in the SEC's announcement of the filing, "whistleblowers are entitled to protection regardless of whether they report wrongdoing to their employer or to the Commission."³⁶ As noted earlier in this article, the Second Circuit ended up deciding the appeal without ruling on the internal-reporting issue. That issue is now before the U.S. Court of Appeals for the Eighth Circuit, on appeal from the district court's decision in the *Bussing* case cited above.³⁷

The sharp disagreement reflected in these court decisions will be resolved at some point, but for now the question of whether an internal whistleblower is protected will turn in part on the jurisdiction in which his case is heard. From the position it took in *Liu* and from public comments the author has heard from SEC officials addressing the question, the SEC appears ready to stand firm by its rule extending protection to internal whistleblowers whenever possible. Mr. McKessy has noted that the Fifth Circuit's decision in *Asadi* should disappoint those corporate interests that had insisted that the SEC Whistleblower Program avoid interference with internal compliance efforts. "[I]f word gets out that reporting internally means you will be unprotected," McKessy told *Law360*, "that may drive people to report to us more than the companies had hoped."³⁸

³⁶ Statement on Court Filing by SEC to Protect Whistleblowers from Retaliation, Feb. 20, 2014, <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370540812998#.UzCgVM6x6K4>.

³⁷ The defendant in *Bussing*, in which the district court held that Dodd-Frank's anti-retaliation provision protected internal reporting, moved the court for certification of the question for interlocutory appeal to the Eighth Circuit. The district court granted that motion but denied the defendant's motion to stay further proceedings pending the outcome of its appeal. See *Bussing v. COR Clearing, LLC*, No. 12-238, 2014 WL 3548278 (D. Neb. July 17, 2014).

³⁸ Stendahl, M., Five Questions for SEC Whistleblower Chief Sean McKessy, *Law360*, Aug. 19, 2013, http://www.law360.com/employment/articles/465613?nl_pk=56e272bd-4da2-47fd-86b7a808016fe7b6&utm_source=newsletter&utm_medium=email&utm_campaign=employment

C. Enforcement of Anti-Retaliation Provisions by the SEC

The SEC Whistleblower Program rules allow the Commission to prosecute violations of the Dodd-Frank anti-retaliation provisions through the Commission's own enforcement actions. Rule 21F-2(b)(2). Since the inception of the program, SEC officials have repeatedly stated that they were on the lookout for strong retaliation cases and that they intended to recommend enforcement action based on the right facts.³⁹

On June 15, 2014, the SEC made good on those assurances when it announced its first enforcement action against a company for retaliation against a whistleblower.⁴⁰ In that case, the SEC charged hedge-fund advisory firm Paradigm Capital Management, Inc., and its owner with engaging in principal transactions that created an undisclosed conflict of interest with a hedge fund client, and also charged Paradigm with retaliating against its head trader, who reported the matter to the SEC through a whistleblower tip. As soon as the firm learned of the head trader's contact with the SEC, it removed him from his position, demoted him, and stripped him of supervisory responsibilities. Paradigm agreed to settle the charges for \$2.2 million, although the SEC's order implementing the settlement left unclear what portion of the settlement was based on the retaliation charge.⁴¹ The whistleblower may be eligible for an award of up to 30% of the settlement.

The *Paradigm* case sends a strong signal to employers that the SEC will take action when they retaliate against whistleblowers. This means that employers who retaliate against whistleblowing employees risk having to defend themselves not only against lawsuits and administrative charges filed by the employees, but also against SEC investigations and enforcement actions that can lead to significant penalties over and above any amounts employees win in court. The *Paradigm* case also lets would-be whistleblowers know that the SEC Whistleblower Program welcomes their participation in two ways – by providing financial

³⁹ In an interview with the *Wall Street Journal* in September 2013, Whistleblower Office Chief Sean McKessy confirmed that the Whistleblower Office intended to enforce Dodd-Frank's whistleblower provisions and that the Whistleblower Office was "actively looking for ways to be proactive in pursuing, under appropriate circumstances, a retaliation claim," even in a situation where the whistleblower had a reasonable belief that the underlying conduct he or she reported was true but the whistleblower turned out to be wrong. See Rachel Louise Ensign, *Q&A: Sean McKessy, Chief, SEC's Office of the Whistleblower*, WALL STREET JOURNAL (RISK & COMPLIANCE JOURNAL BLOG), September 24, 2013, available at: <http://blogs.wsj.com/riskandcompliance/2013/09/24/q-a-sean-mckessy-chief-of-the-secs-office-of-the-whistleblower/>

⁴⁰ See Press Release No. 2014-118 (June 16, 2014), at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542096307#.VAndkPldXxp>.

⁴¹ See Order Instituting Cease and Desist Proceedings, Release Nos. 72393, 3857 (June 16, 2014), at <http://www.sec.gov/litigation/admin/2014/34-72393.pdf>.

rewards where appropriate, and by and by penalizing (and hopefully deterring) retaliation against whistleblowing employees by their employers.

Whistleblowers and their counsel should also keep in mind that the rules protect whistleblowing employees who have a “reasonable belief” that the information they are reporting reveals possible securities law violations. Rule 21F-2(b). The term “possible violation” was included as an attempt to deter frivolous claims while still protecting those with information regarding a plausible violation. *See* Adopting Release at 12-13. The final rules make it clear that the anti-retaliation protections apply regardless of whether a whistleblower qualifies for an award. *See* Adopting Release at 18.

D. Employer-Imposed Agreements That Impede Whistleblowers

Another important protection for whistleblowers provided by the final rules is found in Rule 21F-17(a), which provides:

No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement ... with respect to such communications.

This far-reaching rule applies to nearly all confidentiality and non-disclosure agreements that employers require of current employees. It also applies to separation, severance or settlement agreements, which generally include confidentiality provisions. SEC representatives have made clear in discussions with lawyers who represent both whistleblowers and corporations that they intend to enforce this provision stringently. There is no parallel rule in the regulations that govern similar whistleblower programs such as the Internal Revenue Service’s whistleblower program or the anti-retaliation provisions of the False Claims Act, although courts have refused to enforce confidentiality agreements in the context of the False Claims Act. *See Head v. The Kane Co.*, 668 F. Supp.2d 146, 152 (D.D.C. 2009).

Lawyers representing whistleblowers before the SEC have observed a troubling trend among employers that would seek to circumvent Rule 21F-17(a). Employees increasingly find themselves presented with severance agreements or settlement agreements that require them, as a condition of receiving severance payments, to certify that they have not shared confidential information with any third party, to waive their right to an SEC award, to assign any award received to the government, and/or to keep the employer informed any contact with or inquiries from government agencies. While such terms may sound similar to contractual language addressing legal claims that a departing employee can lawfully waive in exchange for consideration, they have only one purpose and one effect in the context of the SEC Whistleblower Program – that is, to impede individuals from communicating directly with the Commission.

To the extent that employers would enforce such to impede an employee in providing information to the SEC, such clauses are now unenforceable under Rule 21F-17(a), as are clauses that would only permit sharing such information with the government or SEC “as required by

law.” The Office of the Whistleblower has taken a very aggressive stance against such employer tactics. As reported by Law360, Whistleblower Office Chief Sean McKessy stressed during remarks before the Georgetown University Law Center Corporate Counsel Institute on March 14, 2014, that the SEC was on the look-out for contracts that impeded whistleblowers in any way from bringing information about company wrongdoing to the SEC. McKessy said, “[W]e are actively looking for examples of confidentiality agreements, separation agreements, employee agreements that ... in substance say ‘as a prerequisite to get this benefit you agree you’re not coming to come to the commission or you’re not going to report anything to a regulator.’” He added, “And if we find that kind of language, not only are we going to go to the companies, we are going to go after the lawyers who drafted it. We have powers to eliminate the ability of lawyers to practice before the commission. That’s not an authority we invoke lightly, but we are actively looking for examples of that.”⁴²

Two partners with whistleblower law firm of Katz, Marshall & Banks, LLP, wrote a letter to the SEC Commissioners in May 2013 detailing the ways in which employers imposed agreements on employees that had the effect of impeding employees in communicating with the SEC.⁴³ The letter pointed out that these practices posed a serious threat to the SEC Whistleblower Program, and called on the SEC take action against such practices, in part by amending Rule 21-17(a) to read as follows (proposed additions underlined):

No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, or to affect the rights of an individual who does so. Prohibited actions include, but are not limited to: (1) enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications; (2) requiring that an individual waive, assign, or otherwise relinquish his or her right to a whistleblower award under the provisions of Section 21F of the Securities and Exchange Act of 1934; (3) requiring that an individual disclose or report to any third-party, including a former employer, any inquiries, subpoenas, or request for information the individual receives from the Commission, or from any agency working with the Commission, concerning any possible securities law violation; and (4) requiring

⁴² Brian Mahoney, SEC Warns In-House Attys Against Whistleblower Contracts, *Law360*, March 14, 2014. <http://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts>.

⁴³ See David J. Marshall and Debra S. Katz, A Letter to SEC Commissioners re: The Use of Severance Agreements to Impede Individuals from Participating in the SEC Whistleblower Program: A Growing Problem and a Recommendation (May 8, 2013), at <http://kmblegal.com/wordpress/wp-content/uploads/130508-Letter-to-SEC-Commissioners.pdf> See also Marshall, D., and Katz, D., SEC Must Stop the Latest Effort to Impede Whistleblowers, *Law360* (May 13, 2013), at <http://www.law360.com/articles/440923/sec-must-stop-the-latest-effort-to-impede-whistleblowers>.

an individual to assist or cooperate with any third party in responding to or defending itself in an SEC's investigation.

Other whistleblower advocates have also appealed to the SEC to prevent employers from using forced agreements and other such tactics to impede their employees from communicating with the SEC. On July 21, 2014, the Government Accountability Project and securities law firm Labaton Sucharow LLP filed a rulemaking petition with the SEC asking the Commission to amend Rule 21F-17 to prohibit such tactics, and to issue a strong policy statement confirming the SEC's position that the Dodd-Frank Act protected whistleblowers against retaliation for internal reporting.⁴⁴ The same day, a group of several dozen labor, government-reform and employee-rights organizations submitted a petition calling on the SEC to hold hearings on workplace retaliation and to issue new regulations strengthening protections for employees who report potential securities violations.⁴⁵

IV. Things to Think About Before You Tip

The SEC Whistleblower Program has been accepting tips for more than four years now, and the formal program rules have been in effect since August 12, 2011. The SEC reports a significant increase in the number and quality of tips it is receiving since the program went into effect. During the seven weeks it operated during fiscal year 2011, the SEC received 334 whistleblower TCRs; in fiscal year 2012, 3,001 whistleblower TCRs; and in fiscal year 2013, 3,238 whistleblower TCRs.⁴⁶ The number and quality of tips can only grow as more insiders who have information about securities violations learn about the program, and as the SEC distributes more and larger awards from the fund it has set up for that purpose, originally funded at \$453 million. Two particularly large awards – \$14 million in September 2013 and \$30 million in September 2014 – have received a great deal of attention. These are the types of incentive that will help persuade more employees and other insiders to “do the right thing” and take action to combat serious securities violations.

This author and other lawyers representing whistleblowers before the SEC are finding that the SEC Office of the Whistleblower is responding promptly to the high-quality tips it receives. Whistleblowers who prepare strong submissions focusing on violations that fit within the SEC's law-enforcement priorities, and especially those who follow up by contacting the Office of the Whistleblower after filing and aiding the SEC in any ensuing investigation, can expect an opportunity to meet with SEC staff early on in the process.

The following is a partial list of do's and don'ts for practitioners who seek to help their clients make a compelling case for enforcement action by the SEC. These considerations, which should also be helpful to whistleblowers who participate in the program without counsel, are

⁴⁴ See <http://www.whistleblower.org/sites/default/files/SECPetition.pdf>

⁴⁵ See <http://whistleblower.org/sites/default/files/FinalOrgSignOn.pdf>

⁴⁶ 2013 Annual Report on the Dodd-Frank Whistleblower Program, *supra*, at 8.

based on the final rules discussed above, the SEC's handling of whistleblower tips to date, and the author's first-hand experience representing clients before the SEC Whistleblower Program:

- Determine whether the client has original information about violations of securities laws or the Foreign Corrupt Practices Act.
- Assess the seriousness of the alleged violations by reviewing past SEC regulatory and enforcement actions, which are available on the SEC's website and searchable by topic, violation, company and other parameters.
- Where needed, assess the potential tip with the help of an expert in the appropriate specialty, such as securities trades, public accounting, or financial reporting. Do the work necessary to find experts in whatever subspecialty is needed, such as broker-dealer compliance, revenue recognition, loan loss reserves, or the intricacies of accounting standards applicable to the particular industry or sector whose activities are in question.
- Determine whether and to what extent your client's information might advance the SEC's current enforcement agenda, which is not a constant. The SEC's website contains a great deal of information about Commission priorities, including enforcement actions, press releases and task-force reports. Speeches by SEC commissioners and leading officials can also shed light on the types of information that may be of greatest interest to the SEC. For example, in June 2013, newly appointed SEC Chairman Mary Jo White told the *Wall Street Journal* that after a several-year focus on cases arising from the financial crisis, the Commission was shifting its focus to accounting fraud and financial-reporting fraud.⁴⁷ And In May 2014, Andrew Ceresney, Director of the SEC Division of Enforcement, spoke with compliance professionals at length about his division's enforcement objectives and the work of various SEC task forces.
- Make sure that your client will be providing information "voluntarily," prior to receiving a request for the same from the SEC or another agency or SRO. If such a request has already been made, give consideration to whether your client might still be eligible for an award given the circumstances of the SEC's waiver the "voluntary" requirement in one case this year as discussed above.
- Prepare the client's submission to the SEC with an emphasis on facts about which the client has "independent knowledge" as defined in the final rules above. Review the client's position, job duties, and how he came into possession of his information to determine whether he falls within one of the groups of individuals who are presumptively excluded from the program for lack of "independent knowledge." This

⁴⁷ See Eaglesham, J. , Accounting Fraud Targeted: With Crisis-Related Enforcement Ebbing, SEC it Turning Back to Main Street, *Wall Street Journal*, May 27, 2013, at <http://online.wsj.com/news/articles/SB10001424127887324125504578509241215284044>

would include attorneys, compliance personnel, and officers or directors who received the information in connection with corporate-governance responsibilities.

- If the client falls into one of the excluded categories, see if the client may be exempt from the exclusion because he reported his concerns internally and has waited 120 days as in the case of the compliance employee discussed above, or because he has reason to believe investors may suffer imminent harm or the company is taking action that is likely to impede an investigation.
- Give careful consideration to whether to advise the client to report internally, keeping in mind that doing so might subject the client to retaliation but might also entitle the client to a larger award, both because he can benefit from additional, related information the company “self-reports” to the SEC and because SEC staff will consider his internal reporting as a factor in determining the size of an award.
- Remember that your client, through you, may file his tip anonymously as long as you follow the procedures set forth in the rules for anonymous submissions. This can certainly help prevent retaliation against your client, especially if he is determined not to report internally for fear of retaliation.
- Use the SEC-supplied forms and carefully follow the rules that apply to them, as a whistleblower is eligible for a reward only if he follows the prescribed procedures.⁴⁸ The importance of following the rules cannot be overemphasized.
- Remember that the SEC receives thousands of tips per year, and that it is important to make your client’s TCR as compelling as possible. If the lawyers and accountants who review tips in the Office of the Whistleblower and the Office of Market Intelligence cannot understand your client’s submission on a first read, it will not likely end up at the top of the stack. Present your facts and analysis clearly and include with the TCR form any relevant documents your client can provide. Although it is possible to supplement your submission later, you do not want to lose the opportunity for the SEC staff to see the basis for a winnable enforcement action to remedy a pressing need in the first thirty minutes of reviewing your tip, and you get only one chance to make that happen.
- Include any “independent analysis” that you, your client or an expert you retain can apply to other facts, even publicly available ones, in a way that will assist SEC lawyers in an investigation. Keep in mind that your submission cannot be “exclusively derived” from certain public sources, but that SEC investigators will accept and appreciate your analysis of publicly available information if the analysis

⁴⁸ This article does not discuss all of the forms and procedures in detail, but they are spelled out clearly in the final rules, including Rules 21F-1, 21F-2 and 21F-10, and in the sample forms and directions for Form TCR (“Tip, Complaint or Referral”) and Form WB-APP (“Application for Award of Original Information”) that are appended to the final rules at 278 – 305.

reveals information that is not publicly available or provides insights that are not generally known.

- Do not include attorney-client privileged communications in your client's submission to the SEC. The Commission will not consider the information, and its receipt of such communications will in itself delay or even discourage the SEC's consideration of the submission as a whole.
- Make sure to consult the website of the SEC Office of the Whistleblower,⁴⁹ which has a great deal of useful information about how to submit a tip and claim an award. That office's staff also answers telephone inquiries about the program and how it works. In addition, the SEC website (www.sec.gov) provides comprehensive, searchable information about securities laws, comment letters to issuers of securities, and past and ongoing Commission enforcement actions that can be very helpful in preparing your tip.
- You may also want to consult with attorneys who are specialize in representing whistleblowers before the SEC, and who have first-hand experience with the SEC's handling of tips under the new program. Attorneys practicing before the SEC will have useful advice about how best to prepare your tip, how to direct the information to appropriate SEC staff, how best to aid the staff in a successful investigation of your information, and how to claim an award successfully.

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Katz, Marshall & Banks, LLP's website at www.kmblegal.com features a wealth of information about how employees who have blown the whistle on unlawful conduct can fight back against unlawful retaliation and also earn financial rewards where available. "Know Your Rights" and "Practice Area" articles in the website's Whistleblower Law section explain both the law and practicalities of whistleblowing as they play out in a wide range of industries and professions. Whistleblower topics include Corporate and Accounting Fraud, the SEC Whistleblower Program, Qui Tam Lawsuits under the False Claims Act, IRS Whistleblowers, Compliance Officer Whistleblowers, Consumer Finance Whistleblowing, the Pharmaceutical Industry, Food Safety, the Nuclear Industry, and Consumer Product Safety Whistleblowers, to name just a few. See <http://www.kmblegal.com/practice-areas/whistleblower-law/>.

The Katz, Marshall & Banks website also hosts two informative blogs that can help keep whistleblowers and other conscientious employees up to date on new developments in whistleblower law and related news – an SEC Whistleblower Blog (<http://www.secwhistleblowerblog.com/>) that focuses on the SEC program, and a separate Whistleblower Law Blog (<http://www.kmblegal.com/whistleblower-law-blog/>) with broader whistleblower news and developments.

⁴⁹ <http://www.sec.gov/whistleblower>